UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BRONX LEGAL SERVICES and QUEENS LEGAL SERVICES CORP.,

Plaintiffs,

-against-

LEGAL SERVICES CORPORATION, LEGAL SERVICES FOR NEW YORK CITY, and LEONARD KOCZUR, Acting Inspector General of the Legal Services Corporation,

Defendants.

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00 Civ. 3423(GBD)

~~MEMORANDUM OPINION AND ORDER~~

GEORGE B. DANIELS, DISTRICT JUDGE:

The parties in this action have made cross-motions for summary judgment. For the reasons set forth below, defendants' motions for summary judgment are granted and plaintiffs' cross-motion for summary judgment is denied. As a result, the other motions pending in this action are moot.[1]

Background

Defendant Legal Services Corporation ("LSC"), which is headquartered in Washington, D.C., is a non-profit corporation created by Congress in the Legal Services Corporation Act of 1974, 42 U.S.C. §§ 2996 et seq ("LSC Act"). LSC was established "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. § 2996b(a). Pursuant to this statute, LSC contracts to provide funding to various grantee organizations throughout the United States, among them

[1]The other motions pending in this action are the Inspector General's Motion to Dismiss or Stay, Plaintiff's Motion for a Preliminary Injunction, and Legal Services for New York City's Motion for Retention of the Inspector General as a Party.

defendant Legal Services for New York City ("LSNY"). LSNY does not provide any direct legal services to clients, but distributes the funding it receives to various subgrantee organizations in New York City. Plaintiffs, Bronx Legal Services and Queens Legal Services Corporation, are non-profit organizations that receive funding from LSNY to provide legal services to eligible low income individuals in New York City.[2] LSNY provides funding to plaintiffs pursuant to contracts ("the Contracts") negotiated and executed in New York and governed by New York law.

In 1999, the Office of the Inspector General of LSC ("OIG") decided to audit the accuracy of the reporting data provided to LSC. OIG made two separate requests or "data calls" to a sample of LSC grantees chosen at random, including LSNY. In data call number one, the OIG requested that LSNY, and plaintiffs through LSNY, produce information which included case numbers and problem codes without client names. In data call number two, the OIG requested client names and case numbers for each closed case. Plaintiffs refused to provide to LSNY, and LSNY refused to provide to the OIG, the full name of each client. Plaintiffs and LSNY maintained that production of this information, coupled with the problem codes previously produced, would require disclosure of privileged information and would violate the Code of Professional Responsibility of the New York State Bar Association and the Disciplinary Rules of the Appellate Division of the New York Supreme Court.

On or about March 22, 2000, the OIG issued an administrative subpoena requiring LSNY to produce the client names at the OIG in Washington, D.C.. On April 25, 2000, the OIG filed a

[2]Legal Services for the Elderly ("LSE") was formerly a plaintiff in this action. Pursuant to a stipulation between the parties, this Court dismissed LSE's claims as moot on December 3, 2001.

petition in the United States District Court for the District of Columbia for summary enforcement of the administrative subpoena ("the D.C. Action"). Plaintiffs were neither served with the subpoena, nor named as respondents in the summary enforcement proceeding in the District of Columbia. However, they feared that LSC would terminate LSNY's funding for failure to provide the information required by the subpoena and LSNY might, in turn, terminate plaintiffs' funding for the same reason. Therefore, on May 4, 2000, plaintiffs commenced this action requesting that this Court declare that defendants have no right to demand from plaintiffs, and plaintiffs have no obligation to provide to defendants, the additional information that the OIG subpoenaed from LSNY. They also request that this Court enjoin defendants from depriving plaintiffs of funding, and from terminating and debarring plaintiffs from any future funding, as a result of their refusal to provide the additional information.

On June 14, 2000, the D.C. District Court issued a decision in favor of OIG on the petition for summary enforcement of the administrative subpoena. See United States v. Legal Services for New York City, 100 F. Supp. 2d 42 (D.D.C. 2000). The court rejected LSNY's blanket assertion of attorney-client privilege, while not foreclosing specific claims regarding individual clients. That court also held that the requirement under section 509(h) of the 1996 Omnibus Appropriations Act that recipients of LSC funds produce client names to auditors (1) was unambiguous in its requirement that LSC grantees make available client names, irrespective of their context, and (2) provided a legal basis for lawyers under subpoena to disclose client names without breaching their obligations under New York's rules of ethics. Id. That decision was affirmed on appeal and remanded to the district court to allow LSNY to make any specific privilege claims. United States v. Legal Services for New York City, 249 F.3d 1077 (D.C. Cir.

2001).

After the decisions in the DC Action, LSNY requested that plaintiffs provide the requested information to LSNY and the OIG pursuant to the Contracts. Plaintiffs continued to refuse to provide such information to LSNY.

OIG and LSC now move for summary judgment. LSNY moves for partial summary judgment with the exception of plaintiff's claims, if any, of attorney-client privilege with regard to any individual clients. Plaintiffs have indicated that they "are not asserting asserting attorney-client privilege as a basis for refusing to provide the information." (Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Cross-Motion for Summary Judgment ("Pls.' Mem.") at 5.) Thus, a decision in LSNY's favor is also dispositive of this action. Plaintiffs oppose these motions and makes a cross-motion for summary judgment.

Discussion

Under Rule 56, summary judgment may be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). A genuine issue of material fact for trial exists if, based on the record as a whole, a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). A district court must view the record in the light most favorable to the nonmoving party by resolving all ambiguities and drawing all reasonable inferences in favor of that party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574,587-88 (1986); Anderson, 477 U.S. at 255; Tomka v. Seiler Corp., 66 F.3d 1295, 1304 (2d Cir. 1995). The moving party bears the burden of demonstrating that no genuine issue of material fact exists. Anderson, 477 U.S. at 256;

Tomka, 66 F.3d at 1304.

Plaintiffs argue that they are prohibited from producing the client names requested by the OIG because, when coupled with the problem codes that were previously disclosed, the information constitutes a client secret. Section 1200.19 of New York's Disciplinary Rules, 22 N.Y.C.R.R. 1200.19, states that "[e]xcept when permitted under 1200.19(c) of this Part, a lawyer shall not knowingly: (1) reveal a . . . secret of a client." Section 1200.19(c)(2) provides that "[a] lawyer may reveal . . . secrets when . . . required by law or court order." Id. A "secret" is defined as "other information gained in the professional relationship [besides information protected by the attorney-client privilege] that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Id.

Plaintiffs assert that the requested information is a client secret for two reasons. First, plaintiffs asserts that disclosure of the fact of plaintiffs' representation of individual clients is embarrassing to the clients because it reveals that the clients are indigent. (Pls.' Mem. at 11-12.) Second, plaintiffs assert that they represent their clients on "personal, sensitive matters" and their clients would be embarrassed by disclosure of the nature of the representation. (Pls.' Mem. at 12.) Plaintiffs do not cite any caselaw that supports these assertions. As legal support for their position, plaintiffs cite ethical opinions issued by the American Bar Association and the opinions of the legal ethics experts that they have consulted on this matter. (Pls.' Mem. at 9-10 & 12-13.) As an initial matter, none of the ABA ethical opinions cited by plaintiffs present a situation such as this one where the OIG has requested information pursuant to statutory authority. Furthermore, the opinions offered by plaintiffs do not have the force of law and this Court is not bound by them. See Grievance Committee for Southern Dist. Of New York v. Simels, 48 F.3d 640, 645;

United Trans. Union Local Unions 385 and 77 v. Metro-North Commuter Railroad Co., 1995 WL 634906, *5-6 (S.D.N.Y. Oct. 30, 1995). There is no legal basis for this Court to conclude that disclosure of the existence or nature of a client's representation in this context would reveal a client secret. However, this Court need not reach this issue because disclosure of the client names requested by defendants is required by law.

Plaintiffs argue that the LSC Act does not require recipients of LSC funds to disclose client secrets and specifically provides that LSC shall not interfere with an attorney's ethical obligations. See 42 U.S.C. § 2996e(b)(3).[3] However, section 509(h) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-59 (1996) ("Section 509(h)"), supersedes the restrictions of § 2996e(b)(3) of the LSC Act. Section 509(h) states that:

> *Notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3))*, financial records, time records, retainer agreements, client trust fund and eligibility records, and *client names*, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation, except for reports or records subject to the attorney-client privilege.

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[3] 42 U.S.C. § 2996e(b)(3) reads:
The Corporation [LSC] shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association (referred to collectively in this subchapter as "professional responsibilities") or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities.

Id. (emphasis added). Plaintiffs argue that Section 509(h) does not require disclosure of client names along with the nature of the legal representation. This argument fails. In the DC Action, the district court held that the reference in Section 509(h) to client names did not "depend upon context." 100 F. Supp. 2d at 47. The court of appeals affirmed the district court's ruling and noted that, since LSC regulations require retainer agreements to contain the nature of the legal representation, disclosure of retainer agreements along with client names under Section 509(h) "would reveal exactly the sort of information" sought to be withheld, that is "the general matter of individual clients' representations." 249 F.3d at 1083 (citations omitted). The court of appeals rejected LSNY's argument that Section 509(h) does not require disclosure of retainer agreements in a manner that connects the agreements with client names and stated that "if Congress had intended to require production of 'time records, retainer agreements, . . . and client names' only when disassociated from one another, surely it would have said so in terms different from the simple conjunctive phrasing in § 509(h)." Id.

This Court agrees with the D.C. Court of Appeals' interpretation of Section 509(h) and will not graft additional requirements into the statute that were not included or intended by Congress. Therefore, even if the requested information does constitute a client secret, plaintiffs are relieved of any perceived ethical obligations to withhold client names and the nature of the representation because they are required by law to disclose the requested information. See 22 N.Y.C.R.R. 1200.19(c)(2). Plaintiffs do not dispute that they are recipients of LSC funds through LSNY, and plaintiffs are not exempt from the requirements of section 509(h) merely because the funds that they receive from LSC are funneled through LSNY.

Furthermore, the provisions of the Contracts also require plaintiffs to provide the requested information to defendants. Section 14.3 of the Contracts states that, notwithstanding any other provisions of the Contracts, plaintiffs will comply with the "'Assurances Given By Applicant as Condition for Approval of Grant' made by LSNY to [LSC], a copy of which Assurances has been provided to [plaintiffs]." (Scherer Decl., Exh. A at 27, § 14.3; Scherer Decl., Exh. B at 27, § 14.3.) The Assurances provide that LSNY and plaintiffs will "comply with the [LSC Act], and *any applicable appropriations act* and any other applicable law, all requirements of the rules and regulations, policies, guidelines, instructions, and other directives of [LSC] . . . ." (Schwartz Decl., Exh. E at 12, § 1.) (emphasis added.) Section 509(h) is one such applicable appropriations act, particularly because it references the LSC Act. A provision in the Assurances also substantially duplicates Section 509(h).[4] (Schwartz Decl., Exh. E at 12, § 9.) Additionally, a provision in the Contracts themselves substantially duplicates Section 509(h).[5]

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[4]Section 9 of the Assurances reads:
[n]otwithstanding grant assurance number 10 below, and § 1006(b)(3) of the LSC Act, 42 U.S.C. § 2996e(b)(3), [LSNY and plaintiffs] shall make available financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, except for those reports or records which would properly be denied pursuant to the attorney-client privilege, to [LSC] and any federal department or agency that is auditing or monitoring the activities of [LSC, LSNY or plaintiffs] and any independent auditor or monitor receiving federal funds to conduct such auditing or monitoring, including any auditor or monitor of [LSC].

[5]Section 3.2(c) of the Contracts reads:
[n]otwithstanding paragraphs (a) and (b) above, and § 1006(b)(3) of the LSC Act, 42 U.S.C. § 2993(b)(3) [sic] [plaintiffs] shall make available financial records, time records, retainer agreements, client trust funds and eligibility records, and client names, except for those reports or records which would properly be denied pursuant to the attorney-client privilege, to LSNY and any Federal department or agency that is auditing or monitoring the activities of [LSC], LSNY or [plaintiffs] and any independent auditor

(Scherer Decl., Exh. A. at 4, § 3.2(c); Scherer Decl., Exh. B. at 4, § 3.2(c).) As these provisions in the Assurances and in the Contracts incorporate Section 509(h), they are entitled to the same interpretation that this Court has given Section 509(h), which is that these provisions require plaintiffs to disclose the requested information.

Plaintiffs other arguments are also without merit. Plaintiffs argue that the information requested by defendants is unnecessary and unreasonable. However, this issue has already been decided in the DC Action. In that action, LSNY contested the reasonableness of the information requested by the OIG and argued that the request was unduly burdensome. Both the D.C. District Court and the D.C. Court of Appeals rejected LSNY's argument. The district court stated that "[i]t is not the province of this court to decide the best way for . . . OIG to carry out its responsibilities" and held that OIG's request was not unreasonable. 100 F. Supp. 2d at 47. The court of appeals affirmed the decision of the district court and held that the information was relevant and would not "unduly disrupt or seriously hinder normal operations." 249 F.3d at 1084 (citations omitted). In the present action, LSNY is merely requesting from plaintiffs the information requested of LSNY by the OIG. This information has already been determined to be reasonable in the DC Action and plaintiffs have offered no basis for this Court to make a different finding.

Plaintiffs also argue that the Inspector General Amendments Act of 1988, 5 U.S.C. app. 3, is unconstitutional. This act designates LSC as a "designated Federal entity" and grants the OIG the authority "to require by subpena the production of all information, documents, reports,

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or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of LSNY.

answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act . . . ." 5 U.S.C. app 3 §§ 8G(a)(2) & 6(a)(4). Plaintiffs argue that the OIG is not a governmental entity and Congress unconstitutionally delegated its legislative power to a private entity by giving the OIG the authority to subpoena. Plaintiffs attempt to support their argument with two cases. However, these cases are readily distinguishable.

Plaintiffs quote language from Loving v. United States, 517 U.S. 748, 758 (1996), stating "[t]he fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity" and from Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935), stating "Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." (Pls.' Mem. at 22.) The holding in Loving is actually contrary to plaintiff's position. The Court held that Congress has limited delegation powers. See Loving, 517 U.S. at 751 (holding Congress has power to delegate its constitutional authority to the President to define "aggravating factors that permit a court-martial to impose the death penalty upon a member of the Armed Forces convicted of murder.") The language plaintiff quotes from the opinion was merely a statement of the general rule in order to illustrate an exception to the rule. In Panama Refining Co., the Court held that legislation which delegated unlimited authority to the President to pass a law prohibiting the transportation of petroleum and petroleum products was unconstitutional. 293 U.S. 388. The Court stated that while Congress has the authority to delegate some of its functions to others, it may not delegate an essential lawmaking function to an entity without prescribing some limits to the entity's authority. Id. at 421-33. In contrast to the unlimited

lawmaking authority delegated in Panama Refining Co., the Inspector General Amendments Act of 1988 merely grants the OIG limited authority to subpoena specific information in conducting audits. Thus, Panama Refining Co. is also inapposite. Accordingly, there is no basis for this Court to hold that the Inspector General Amendments Act of 1988 is unconstitutional.

Plaintiffs also argue that Section 509(h) is unconstitutional. Plaintiffs cite three reasons in support of this argument. First, plaintiffs argue that Section 509(h) violates the separation of powers principle because it infringes on the judicial function of regulating attorneys by requiring attorneys who receive LSC funds to disclose client secrets. However, New York's ethical rules allow attorneys to reveal client secrets when required by laws such as Section 509(h), thereby foreclosing any infringement arguments. See 22 N.Y.C.R.R. 1200.19(c)(2).

Plaintiffs argue that Section 509(h) violates the First Amendment by requiring disclosure of the identity of clients exercising their right of association to consult with an attorney, without any compelling need for the disclosure. However, there is a sound reason for the defendants' request. OIG is requesting the information from LSNY, and LSNY is requesting the information from plaintiffs, because OIG is carrying out the purposes for which it was established, to audit and investigate LSC and recipients of LSC funds. See 5 U.S.C. app 3 § 2.

Plaintiffs final constitutional argument is that Section 509(h) violates due process and equal protection by requiring disclosure of client secrets as a condition of receiving federal funds. Plaintiffs argue that clients' due process rights are violated because they are required to unreasonably disclose their association with plaintiffs as a condition of receiving federally funded legal services. As previously stated, the information requested is not unreasonable and the OIG is requesting the information to fulfill its statutory functions. Plaintiffs' equal protection

argument is that only indigent people are affected. However, indigence alone is not a suspect class under equal protection analysis. See, e.g., Maher v. Roe, 432 U.S. 464, 471 (1977) (citations omitted) (the Supreme Court "has never held that financial need alone identifies a suspect class for equal protection analysis."); Woe v. Cuomo, 729 F.2d 96, 103 (2d Cir. 1984) (citations omitted) ("[t]he Supreme Court has consistently held that poverty without more is not a suspect classification."). Accordingly, there is no basis for this Court to hold that Section 509(h) is unconstitutional.

For the foregoing reasons, defendants' motions for summary judgment are granted and plaintiff's cross-motion for summary judgment is denied. The other motions pending in this action are, therefore, moot.

Dated: New York, New York
August 7, 2002

SO ORDERED:

George B. Daniels

GEORGE B. DANIELS
United States District Judge